

ORDER NO. 3827

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Chairman;
Mark Acton, Vice Chairman;
Tony Hammond; and
Nanci E. Langley

Rule on Motions Concerning
Mail Preparation Changes

Docket No. RM2016-6

REVISED NOTICE OF PROPOSED RULEMAKING

(Issued March 27, 2017)

I. INTRODUCTION

On January 22, 2016, the Commission published a notice of proposed rulemaking (initial NPR) which proposed procedural rules for motions concerning mail preparation changes that require compliance with the price cap rules.¹ The initial NPR was issued in conjunction with the Commission's order in Docket No. R2013-10R setting forth a standard to determine when mail preparation changes require compliance with § 3010.23(d)(2).² In the initial NPR, the Commission explained that the Postal Service has the affirmative burden to determine whether a mail preparation change

¹ The initial NPR was published in the *Federal Register* on February 1, 2016. See 81 FR 5085 (Feb. 1, 2016).

² Order No. 3048, Notice of Proposed Rulemaking on Motions Concerning Mail Preparation Changes, January 22, 2016. The initial NPR was held in abeyance pending the Commission's resolution of the Postal Service's motion for reconsideration of Order No. 3047. See Order No. 3096, Order Holding Rulemaking in Abeyance, February 23, 2016. It was reinstated on July 27, 2016, and comments were received on September 2, 2016. See Notice Reinstating Rulemaking, July 27, 2016.

requires compliance with § 3010.23(d)(2) under the Commission's standard in Order No. 3047.³ The initial NPR proposed a procedural rule to permit interested parties to file a motion with the Commission where the Postal Service fails to recognize or account for a mail preparation change that has a rate effect under § 3010.23(d)(2).

Specifically, the initial proposed rule § 3001.21(d) of this chapter required interested parties to file a motion with the Commission upon actual or constructive notice of a mail preparation change that had a rate effect requiring compliance with § 3010.23(d)(2). It also proposed a 30-day timeframe within which interested parties could file a motion concerning a mail preparation change, after which the Commission would either institute a proceeding or consider the motion within an ongoing matter.

In response to comments received on the initial NPR, the Commission is issuing this revised notice of proposed rulemaking (revised NPR) that: (1) withdraws the proposed procedural rule under § 3001.21(d) of this chapter for motions concerning mail preparation changes; and (2) requires the Postal Service to publish all mail preparation changes in a publicly-available single source and affirmatively designate whether or not a mail preparation change requires compliance with § 3010.23(d)(2). The revised NPR specifies that, if raised by the Commission or challenged by a mailer, the Postal Service must demonstrate by a preponderance of the evidence that a change does not require compliance with § 3010.23(d)(2). The revised NPR narrows the scope of the initial proposed rule and provides an opportunity for public comment on this new proposed approach to ensure that the Postal Service properly accounts for the rate effects of mail preparation changes under § 3010.23(d)(2) in accordance with the Commission's standard articulated in Order No. 3047.

³ Docket No. R2013-10R, Order Resolving Issues on Remand, January 22, 2016 (Order No. 3047).

II. COMMENTS ON INITIAL NPR

The Commission received comments in response to the initial NPR, of which three were from the mailing industry, one was from the Public Representative, and one was from the Postal Service. Most commenters do not oppose the proposed rule, but raise questions about whether it impacts the Commission's authority and responsibility to independently review mail preparation changes for compliance with the price cap rules, or whether mailers could raise issues concerning mail preparation changes in other proceedings before the Commission. Commenters provide input generally on the following issues: (1) the timing provisions and effect on the Commission's independent authority; (2) the multiple sources used by the Postal Service to provide notice of mail preparation changes; (3) the Postal Service's affirmative statement of whether a mail preparation change has a rate impact; and (4) the standard of proof/evidentiary burden.

A. Comments on the Timing Provisions and Effect on the Commission's Independent Authority

A major area of concern raised by the commenters is the proposed rule's effect on the Commission's independent authority to review mail preparation changes for price cap compliance. Commenters raise questions about the rule's effect on the right to use existing procedures available in rate, annual compliance, and complaint proceedings to challenge the Postal Service's compliance with the price cap.

PostCom raises numerous issues with the proposed 30-day time limit and notice provisions set forth in the proposed rule.⁴ PostCom notes that, absent a waiver of the 30-day timeframe in certain circumstances, the 30-day requirement for filing motions conflicts with the Commission's price cap authority and responsibilities under 39 U.S.C. 3662 to hear complaints. PostCom Comments at 5-9. PostCom contends that, although it makes sense to provide mailers with a set procedure to raise issues with mail preparation changes, the Commission "should review the Postal Service's mail

⁴ Comments of the Association for Postal Commerce, September 2, 2016 (PostCom Comments).

preparation changes and act independently if it determines that a change may result in prices in excess of the cap.” *Id.* at 8. PostCom submits that the 30-day window for filing motions potentially conflicts with the complaint procedures under 39 U.S.C. 3662(a) and contends that the Commission should not foreclose the ability of parties to utilize the complaint process which ensures “that violations of the price cap that are not immediately apparent can still be challenged.” *Id.* at 9.

Valpak states that the proposed rule will not fulfill the goal of ensuring that the Postal Service properly accounts for the rate effects of mail preparation changes under the Commission’s price cap rules.⁵ Valpak views the 30-day timeframe and the potential foreclosure of “any other opportunity or method of raising such an issue in another forum or at a later time” as conflicting with the stated purpose of the rule. Valpak Comments at 2. Valpak notes that the structure of the proposed rule could be used by the Postal Service to argue that the “other avenues to request that the Commission require Postal Service compliance to the price cap rules, including filing comments in pricing dockets and annual compliance reviews, as well as filing a complaint” would be foreclosed if an interested party fails to file a motion under the proposed rule. *Id.* at 3. Valpak requests the Commission clarify that the proposed rule was not intended to be the exclusive remedy for issues regarding price cap compliance of mail preparation requirement changes. *Id.*

The National Postal Policy Council, the National Association of Presort Mailers, and the Association for Mail Electronic Enhancement (Joint Commenters) submit that the proposed rule should not be the exclusive means to raise the issue of price cap compliance for mail preparation requirements as a procedural rule “cannot substitute for the Commission’s and Postal Service’s legal responsibilities to ensure that rates for market-dominant products comply with the price cap restrictions established by the

⁵ Comments of Valpak Direct Marketing Systems, Inc. and the Valpak Franchise Association, Inc. on Proposed Rule on Motions Concerning Mail Preparation Changes, September 2, 2016, at 1-2 (Valpak Comments).

Congress.”⁶ The Joint Commenters submit that the proposed rule “cannot shift to mailers the burden of proving that a mailing preparation change constitutes a classification change with cap implications merely by creating a procedural means of raising the issue.” Joint Comments at 12-13. Further, the Joint Commenters contend that a 30-day time period is insufficient to recognize the price cap implication of certain mail preparation changes and also prepare and file a motion within that timeframe. *Id.* at 7-8.

The Public Representative questions the utility of a time limit on motions concerning mail preparation changes where such changes are made effective immediately or a short time after notice.⁷ Additionally, he questions whether a time limit on filing motions would mean that the Postal Service would be able to potentially violate the price cap if a motion was untimely. PR Comments at 10. His main concern is that the proposed rule leaves open a gap in price cap compliance review, where

a rate impact resulting from [mail preparation] changes would not necessarily be discovered if the Postal Service is required only to notify the Commission when it finds deletion or redefinition will occur and files for a rate change, or where an interested person recognizes a potential rate change and is willing to undertake the effort to file a motion with the Commission.

Id. at 8. He concludes that the Commission “should not abdicate its responsibility to administer the price cap rules by not ensuring consideration of whether rate cells are effectively deleted or redefined by such changes, whether noticed in the DMM or elsewhere.” *Id.* at 7.

The Postal Service submits that the proposed rule should include a deadline for resolving motions, in addition to the 30-day timeframe for filing motions, as it seeks to know the “outcome of a mail-preparation motion before going forward with its pricing

⁶ Comments of the National Postal Policy Council, the National Association of Presort Mailers, and the Association for Mail Electronic Enhancement, September 2, 2016, at 3 (Joint Comments).

⁷ Public Representatives Comments, September 2, 2016, at 10 (PR Comments).

plans.”⁸ It proposes that the Commission be required to resolve any motions concerning mail preparation changes within 60 calendar days of their filing. Postal Service Comments at 8.

B. Comments on the Multiple Sources used by the Postal Service to Provide Notice of Mail Preparation Changes

In addition to issues with setting a 30-day timeframe for motions concerning mail preparation requirements, commenters submit that it is difficult to monitor the multiple sources used by the Postal Service to provide notice of mail preparation changes. Numerous commenters request that the Commission direct the Postal Service to identify a publication where all mail preparation changes will be published. Commenters submit that this requirement would allow mailers and the Commission to more easily monitor mail preparation changes for price cap compliance.

PostCom asserts that the multiple sources used by the Postal Service to publish mail preparation changes, changes between draft and final mail preparation changes, and informal communications about proposed changes make it difficult to determine what would trigger the 30-day timeframe for motions under the proposed rule. PostCom Comments at 2-4. As a result of these difficulties, PostCom proposes directing “the Postal Service to identify a publication in which all mail preparation changes will be published.” *Id.* at 5. The Joint Commenters also submit that the Postal Service’s practice of publishing mail preparation changes in multiple, overlapping sources, “has made it harder for mailers to know the current (or future) rules and, by extension, even more difficult to know whether the real effects of mail preparation changes affect the price cap.” Joint Comments at 5. The Public Representative also supports requiring the Postal Service to file notice of mail preparation changes in a single source. PR Comments at 6-7. He submits that, because the changes are not published in a

⁸ United States Postal Service Comments on Proposed Rules for Motions Concerning Mail Preparation Changes, September 2, 2016, at 7-8 (Postal Service Comments).

single source, “the Commission is not in a position to review the effects of each mail preparation change” and this creates a gap in regulatory coverage. *Id.*

C. Comments on the Postal Service’s Affirmative Statement of Whether a Mail Preparation Change has a Rate Impact

A third issue raised by commenters is the utility of the proposed rule’s requirement that the Postal Service only designate where mail preparation changes have a rate impact. PostCom submits that the Postal Service should provide an affirmative statement of no price impact, providing clarity for mailers and no additional burden on the Postal Service in light of their affirmative duty to make the initial determination. PostCom Comments at 7. The Public Representative contends that the proposed rule does not include a mechanism to ensure that the Postal Service will comply with its burden to review mail preparation changes for rate impacts and submits that the Postal Service should be required to affirmatively state whether a mail preparation change has a rate impact for every change. PR Comments at 6-8. The Joint Commenters submit that the Postal Service should also provide information concerning the effect of the change on rate categories and cells, numbers of mailpieces affected by the change, an affirmative statement of whether or not the change has a rate effect, and statement of why the change “will or will not constitute a classification change under the standard adopted in Order No. 3047 as affirmed in Order No. 3441.” Joint Comments at 8-11.

D. Comments on the Standard of Proof/Evidentiary Burden

Commenters also submit questions regarding the evidentiary record and standard of proof that would be required for motions concerning mail preparation requirements and whether it would differ from existing procedures.

The Postal Service requests additional discovery procedures that would “allow for the development of an evidentiary record” under the proposed rule. Postal Service Comments at 4. First, it requests a requirement that mailers offer proof of costs and

operational impact when filing a motion challenging the price cap impact of a mail preparation change. *Id.* at 5. Second, it submits that the proposed rule should include various discovery procedures to assist the Commission and the Postal Service “with evaluating whether the moving party has met its burden of demonstrating that the change imposes costs and burdens significant enough to require compliance with the price cap rules.” *Id.* at 6. In addition, the Postal Service suggests a meet and confer requirement prior to any motion practice over mail preparation changes under the proposed rule. *Id.* at 9.

PostCom submits that although the proposed rule “correctly declines to specify what information a party must provide in support of its motion, as the type of information available will differ in individual circumstances,” it fails to set forth the standard of review the Commission will apply to determine whether a motion warrants further procedures. PostCom Comments at 6. PostCom suggests that the Commission apply a “standard similar to that employed in a motion to dismiss and determine whether the mail preparation change would have a price impact if the consequences alleged by the movant were to occur.” *Id.*

III. REVISED PROPOSED RULE

The revised proposed rule would require the Postal Service to affirmatively designate whether or not a mail preparation requirement change implicates the price cap in a single, publicly available source. Further, if challenged by a mailer or raised by the Commission, the Postal Service would have to demonstrate by a preponderance of the evidence that a mail preparation change does not require compliance with § 3010.23(d)(2).

As numerous commenters raised questions regarding standard of proof for issues regarding compliance with § 3010.23(d)(2) for mail preparation changes, the Commission clarifies that it is the Postal Service’s burden to demonstrate, by a preponderance of the evidence, that a specific mail preparation change does not implicate the price cap. This burden is consistent with the Postal Service’s obligation to

evaluate changes to mail preparation requirements for compliance with § 3010.23(d)(2) in accordance with the Commission's standard set forth in Order No. 3047. For the deletion prong of the Commission's standard, the inquiry is limited to whether the mail preparation change causes the elimination of a rate, or the functional equivalent of an elimination of a rate.⁹ For the redefinition prong, the Postal Service's showing does not require detailed analysis of mailer cost for a mail preparation change because the significance prong of the Commission's standard only requires a determination of whether the mail preparation change is large in magnitude. Order No. 3441 at 31.

As with the majority of proceedings before the Commission, the specific evidence presented will be largely fact dependent subject to the individual circumstances of the matter and the Postal Service's showing will be evaluated based on the evidence available at the time. Accordingly, in any proceeding where the price cap impact of a mail preparation change is being determined or challenged, the Postal Service must be able to show that the greater weight of the available evidence favors a finding that the change does not implicate § 3010.23(d)(2). In addition, as the Postal Service is in the best position to gather information on mailer costs and operational adjustments, in light of its abundant contact and consultation with the mailing industry, the Postal Service may submit such evidence and seek a determination from the Commission using the procedures set forth under § 3001.21 of this chapter prior to implementation of the change.

Under the revised rule, the Postal Service may designate a single source of its choosing, so long as the source is published and publicly available. The Postal Service shall file notice with the Commission after it designates the source it will use. Proposed § 3010.23(d)(5) also directs the Postal Service to affirmatively state in the single source publication whether or not the change requires compliance with § 3010.23(d)(2). This flows from the Postal Service's obligation to properly evaluate its mail preparation changes for compliance with the price cap rules.

⁹ Order No. 3047 at 15-16; Docket No. R2013-10R, Order Resolving Motion for Reconsideration of Commission Order No. 3047, at 31, July 20, 2016 (Order No. 3441).

Single source publication will allow the Commission to independently review mail preparation changes and will, in most circumstances, eliminate the need to have parties initiate motions to bring such changes to the Commission's attention. Accordingly, the revised proposed rule eliminates the separate procedural component for motions concerning mail preparation changes. This change was triggered by commenter concerns over a potentially duplicative procedural rule that would conflict with the Commission's existing procedures and authority to review mail preparation changes for compliance with the price cap rules. The Commission submits that the existing procedures available to interested parties should be sufficient to raise issues of price cap compliance for mail preparation changes. Mailers may notify the Commission using the general motion procedures set forth in § 3001.21 of this chapter if they disagree with the Postal Service's determination of compliance with § 3010.23(d)(2). The rules under § 3001.21 of this chapter require motions to "set forth with particularity the ruling or relief sought, the grounds and basis therefor, and the statutory or other authority relied upon..." Accordingly, any motions filed under § 3001.21 of this chapter concerning mail preparation changes shall provide all information the mailers have to rebut the Postal Service's determination, consistent with the Commission's standard set forth in Order No. 3047. The Commission shall weigh the available evidence and provide a determination as soon as practicable based on a preponderance of the evidence standard.

The initial NPR was intended to create a streamlined process by which mailers could submit, and the Commission could review, challenges to the Postal Service's failure to designate a mail preparation requirement change as having a rate effect under § 3010.23(d)(2). However, as submitted by the commenters, the Commission's rules already provide numerous avenues for interested parties to raise issues relating to price cap compliance of mail preparation requirement changes, making an additional procedure redundant. The initial NPR would not foreclose any party from utilizing existing procedures and, as informed by the comments, would not be effective in practice as originally envisioned by the Commission. Accordingly, the Commission

revises the proposed rule to better target the specific goal of ensuring that the Postal Service properly accounts for mail preparation requirement changes under § 3010.23(d)(2).

IV. COMMENTS REQUESTED

Interested persons are invited to provide written comments concerning the proposed rule. The Commission seeks comments on the revised rule, specifically the utility of (1) requiring the Postal Service to publish all mail preparation changes in a single source with an affirmative designation of whether or not the changes require price cap compliance; and (2) the elimination of a separate procedural rule for motions concerning mail preparation requirements.

Comments are due no later than 30 days after the date of publication of this notice in the *Federal Register*. All comments and suggestions received will be available for review on the Commission's website, <http://www.prc.gov>.

It is ordered:

1. Interested persons may submit comments no later than 30 days from the date of the publication of this notice in the *Federal Register*.

2. The Secretary shall arrange for publication of this Order in the *Federal Register*.

By the Commission.

Stacy L. Ruble
Secretary

List of Subjects in 39 CFR Part 3010

Administrative practice and procedure, Postal Service.

For the reasons discussed in the preamble, the Commission proposes to amend chapter III of title 39 of the Code of Federal Regulations as follows:

Part 3010—REGULATION OF RATES FOR MARKET DOMINANT PRODUCTS

1. The authority citation of part 3010 continues to read as follows:

Authority: 39 U.S.C. 503; 3662.

2. Amend § 3010.23(d) by adding paragraph (5) to read as follows:

§ 3010.23 Calculation of percentage change in rates.

* * * * *

(d) * * *

(5) *Procedures for mail preparation changes.* The Postal Service shall provide published notice of all mail preparation changes in a single, publicly available source. The Postal Service shall file notice with the Commission of the source it will use to provide published notice of all mail preparation changes. When providing notice of a mail preparation change, the Postal Service shall affirmatively state whether or not the change requires compliance with paragraph (d)(2) of this section. If raised by the Commission or challenged by a mailer, the Postal Service must demonstrate, by a preponderance of the evidence, that a mail preparation change does not require

compliance with paragraph (d)(2) of this section in any proceeding where compliance is at issue.

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